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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

In re: WORLDCOM, INC., et al., Debtors.	Chapter 11 Case No.02-13533 (AJG)
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**MOTION FOR ALLOWANCE AND PAYMENT
OF ADMINISTRATIVE CLAIM BY HSG/ATN, INC.**

HSG/ATN, Inc. (“HSG”), through its attorneys undersigned, pursuant to § 503(b) of the United States Bankruptcy Code, hereby moves this Court for an order allowing an administrative claim, and the payment thereof, to HSG for the commissions due under a representation agreement with the Debtors. In support of this request, HSG submits the following:

I. JURISDICTION

1. The Court has jurisdiction over this Motion pursuant to 28 U.S.C. § 1334. This Motion represents a core proceeding pursuant to 28 U.S.C. §157(b)(2)(A) and (B).

1 **II. PROCEDURAL AND FACTUAL HISTORY**

2 2. On July 21, 2002, WorldCom, Inc. and certain of its affiliated debtor entities
 3 (collectively, the “Debtors”), filed a voluntary petition under Chapter 11 of Title 11 of the United
 4 States Bankruptcy Code (the “Bankruptcy Code”). The Debtors have been operating their business
 5 and conducting their affairs as debtors in possession since the filing date.

6 3. HSG is a Puerto Rico corporation engaged in the business of procuring and servicing
 7 telephone and internet customers for long distance and internet communication providers.

8 4. On February 4, 1998, HSG and WorldCom Technologies, Inc. (“WorldCom”) entered
 9 into an agreement (“Agreement”) whereby WorldCom¹ appointed HSG as an authorized
 10 representative to market, sell and service products and services of WorldCom’s affiliate TTI National
 11 (TTI”). A copy of the Agreement is attached hereto as Exhibit “A.”

12 5. Under the terms of the Agreement, WorldCom paid HSG commissions based upon the
 13 monthly usage of the TTI services (the “Earned Commissions”) by the customers procured by HSG
 14 (the “Customers”).

15 6. The Agreement has been amended as follows:

- 16 a. First amendment, effective July 21, 1999, attached hereto as Exhibit “B”;
- 17 b. Second amendment, effective November 22, 1999, attached hereto as Exhibit “C”;
- 18 c. Third amendment, effective April 14, 2000, attached hereto as Exhibit “D”;
- 19 d. Fourth amendment, effective June 30, 2000, attached hereto as Exhibit “E”;
- 20 e. Fifth amendment, effective March 1, 2001, attached hereto as Exhibit “F”; and
- 21 f. Sixth amendment, effective November 1, 2001, attached hereto as Exhibit “G”.²

22 7. In July, 2002, WorldCom tendered a seventh amendment to HSG, which HSG
 23 executed on August 9, 2002 and returned to WorldCom. To HSG’s knowledge, this seventh
 24 amendment, which is attached hereto as Exhibit “H,” was not executed by WorldCom.
 25

26 ¹WorldCom includes MCI WorldCom Communications, Inc., the party to the sixth and final amendment with
 27 HSG.

2 ²The Agreement and these subsequent amendments one through six shall be referred to collectively as the
 “Representation Agreement.”

1 8. Pursuant to its terms, the Representation Agreement was terminated on or about
 2 August 6, 2002, as evidenced by the letter from Kirk Reynolds, Associate Commercial Counsel for
 3 WorldCom to HSG attached hereto as Exhibit "I."³

4 9. Following this termination of the Representation Agreement, HSG continued to
 5 service the Customers until approximately December 16, 2002 (the "Service Period"), at which time
 6 the Debtors prevented HSG from continuing to provide such service. This continuing service
 7 provided by HSG included, but is not limited, to fielding complaints and questions from the
 8 Customers, taking and implementing change orders, and generally responding to any inquiry made by
 9 a Customer. This information would then be forwarded to WorldCom electronically. *See* the
 10 Declaration of Jeff Bein attached hereto as Exhibit "J."

11 10. TTI directed the Customers to contact HSG for customer follow-up. As noted in Mr.
 12 Bein's Declaration, Customers were issued a calling card when they signed up for the service. This
 13 calling card bore the phone number of HSG's call center as the contact for customer service. Until
 14 modified at some date after the bankruptcy filing, WorldCom's bills to the Customers also contained
 15 HSG's call center number for customer service.

16 11. The Debtors have paid HSG for Earned Commissions for a portion of July (the post-
 17 petition period), August and September 2002, but none thereafter.

18 12. The obligation to pay ongoing commissions (the "Residual Commissions") to HSG
 19 continues following termination of the Representation Agreement. Paragraphs 2.3.2 and 2.4 of the
 20 Representation Agreement, as amended in paragraphs 9 and 10 of the sixth amendment, respectively,
 21 state:

22 2.3.2 If MCI WorldCom terminates this Agreement under this Paragraph 2.3, then
 23 MCI WorldCom will make payment for commissions earned by Representative
 24 up to the effective date of such termination, and MCI will continue, beyond the
 25 effective date of such termination, (i) to pay commissions earned beyond the
 26 effective date of such termination in accordance with Paragraph 2.4 below, and
 27 (ii) to pay Representative each month the additional five percent (5%)

³Debtors sought to reject the Representation Agreement through the filing of their 'Notice of Rejection of Executory Contracts' dated January 3, 2003. HSG opposed this notice on the grounds that the Representation Agreement had been mutually terminated pursuant to its terms.

1 commission on the Subset of Grandfathered Accounts, as set forth in Paragraph
 2 1B of Exhibit B, regardless of the amount of the Representative's total monthly
 3 Customers' Adjusted Billed Usage (including total Customers' Adjusted Billed
 4 Usage as set forth in Exhibit A and total Grandfathered Customers' Adjusted
 5 Billed usage as set forth in Exhibit B).

6 2.4 Except as set forth in Sections 2.2, 6.2, and 8.3 of this Agreement, MCI
 7 WorldCom will continue to pay commissions to Representative after
 8 termination, but only as long as the monthly total of both Customer's Adjusted
 9 Billed Usage, as set forth in Exhibit A, and Grandfathered Customer's
 10 Adjusted Billed usage, as set forth Exhibit B, ("Representative's Amount")
 11 exceeds the amount of WorldCom's obligation to pay Representative
 12 commissions under this Paragraph 8 will cease the first month Representative's
 13 Amount is less than or equal to The Sum, provided that MCI WorldCom will
 14 pay Representative those commissions earned through the month immediately
 15 preceding the month during which Representative did not exceed The Sum.

16 13. In addition to the services provided to WorldCom set forth in paragraphs 8 and 9
 17 hereinabove, HSG has conferred a valuable benefit upon WorldCom by not soliciting the Customers.⁴
 18 The Representation Agreement requires HSG to refrain from contacting any Customers to induce
 19 them to switch their service provider so long as WorldCom continues to pay the Earned and Residual
 20 Commissions (collectively the "Commissions") due. HSG continues to abide this restrictive
 21 covenant, despite the Debtors' failure to pay the Commissions as they accrue under the terms of the
 22 Representation Agreement.

23 **III. ARGUMENT**

24 According to 11 U.S.C. § 503(b)(1)(A), "the actual, necessary costs and expenses of
 25 preserving the estate, including wages, salaries or commissions for services rendered after the
 26 commencement of the case" constitute administrative expenses entitled to priority status upon
 27 distribution of the estate. One of the main incentives for the granting of an administrative expense
 28 priority is to provide an incentive for creditors and others to continue to provide services for the
 29 insolvent entity to allow it to effectively rehabilitate and pay its creditors. *See e.g., In re Jartran, Inc.,*

30 ⁴In November, 2002, after receiving notification from WorldCom that it would not be paying any further
 31 Commissions, HSG did contact Customers. WorldCom sent HSG a letter demanding it cease communicating with
 32 Customers. Although HSG believes that this anticipatory breach excuses it from honoring this restrictive covenant, and
 33 without waiving this position, HSG has ceased communications with the Customers at this time.

1 732 F.2d. 584 (7th Cir. 1984); *In re Mammoth Mart, Inc.*, 536 F.2d 950 (1st Cir. 1976). Consistent
 2 with this policy, two tests for determining the applicability of an administrative expense claim have
 3 developed. An administrative expense claim arises only from a transaction between the creditor and
 4 the trustee or debtor-in-possession. *Trustees of Amalgamated Insurance Fund v. McFarlin's*, 789
 5 F.2d. 98, 101 (2nd Cir. 1986). An expense claim must have provided a benefit to the estate. *Id.* HSG
 6 has satisfied these two tests in two different fashions.

7 A. **HSG is entitled to an administrative expense claim for its services**
 8 **provided to the estates.**

9 HSG has provided substantial and valuable services to the Debtors post-petition,
 10 through December 16, 2002 (the "Service Period"), which is the last date HSG provided follow-up
 11 services to the Customers. The services provided by HSG during the Service Period were significant,
 12 ranging from dealing with Customers' address changes and service changes to fielding questions and
 13 complaints. All of this service information was then relayed to WorldCom. There exists an obvious
 14 nexus between this customer service and the retention of the customer base. The end result is a
 15 benefit to these estates by the continued income from satisfied Customers.

16 The value conferred upon the estates during the Service Period for these services
 17 provided by HSG is the amount of commissions due under the terminated contract. Indeed, this is
 18 best evidenced by the payment of the Earned Commissions for the post petition periods of July,
 19 August and September 2002. Accordingly, HSG is entitled to the Earned Commissions for the period
 20 from October 1, 2002 through December 16, 2002 in the approximate amount of \$600,000. The
 21 precise amount due for this period will be ascertained after obtaining and reviewing documentation
 22 from the Debtors.

23 B. **HSG is Entitled to Residual Commissions as an Administrative Expense**

24 The Representation Contract terminated by the parties according to its terms.
 25 Notwithstanding, certain obligations survived termination.

26 Specifically, the operative language of the Representation Agreement is found in
 27 paragraph 8.1 of the original agreement which states, in relevant part:

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1 8.1 For so long as WorldCom pays Representative commissions in
2 accordance with Exhibit B, Representative agrees that Representative will
3 not contact any Customers or WorldCom Group customers procured
4 pursuant to this Agreement or any other Agreement with the WorldCom
Group for the purposes of inducing them to switch to another provider of
any service which competes with the Services...

5 This restrictive covenant has survived termination of the Representation Agreement,
6 subject to the Debtors' obligation to continue to pay the Commissions. At the Debtors' insistence,
7 HSG has not solicited customers. The Customers continue to obtain and pay for service from
8 WorldCom. Logically, HSG is providing valuable consideration to these estates by not inducing any
9 Customers to leave WorldCom for another long distance and internet service provider.

10 These mutual obligations have survived the termination of the Representation
11 Agreement. Arguably, HSG's obligation to abide by the restrictive covenant is excused as
12 WorldCom materially breached its obligation to pay the Commissions in accordance with paragraph
13 8.1 quoted above. *See, Matheney v. McClain*, 248 Miss. 842, 161 So. 2d. 516 (1964).
14 Notwithstanding, HSG has complied by the demand of WorldCom to restrain from contacting the
15 Customers.

16 HSG has met its burden of meeting the above-referenced tests to establish an
17 administrative claim. First, the restrictive covenant was entered into between HSG and WorldCom.
18 Second, HSG's restraint confers a significant and continuing benefit upon the estates. Accordingly,
19 HSG is entitled to payment of the Commissions as an administrative expense.

20 **IV. CONCLUSION**

21 For the foregoing reasons, HSG urges this Court to authorize the allowance and payment of an
22 administrative claim for the Commissions, pursuant to the terms of the Representation Agreement.
23 This administrative claim should include both the Earned Commissions as of the date hereof, as well
24 as the Residual Commissions that come due in the future.

1 **DATED** this 14th day of February, 2003.

2 **RICHARD L. KORAL, ATTORNEY AT LAW**

3 By /s/ Richard L. Koral

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7 AND

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15 **COPY** of the foregoing
16 mailed this 14th day of
17 February, 2003, to:

18 Marcia L. Goldstein, Esq.
19 Lori R. Fife, Esq.

20 Alfredo R. Perez, Esq.

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26 /s/ Richard L. Koral

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